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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO**

Estate of ROBERT JULIAN
BALLARD, Deceased.

FRED ROBBIN et al.,

Petitioners and Appellants,

v.

WILLIAM BURR, as Trustee, etc.,

Objector and Respondent.

E045616

(Super.Ct.No. INP 021296)

OPINION

APPEAL from the Superior Court of Riverside County. Randall Donald
White, Judge. Dismissed.

Fred and Candis Robbin, in pro per., for Petitioners and Appellants.

Law Offices of Raymond H. Simmons and Robert F. Nunes, for Objector
and Respondent.

Petitioners and Appellants Fred and Candis Robbin (the Robbins), acting in
pro per, appeal from the trial court's order entering judgment in favor of defendant

and respondent William Burr (Burr). The trial court entered judgment after the Robbins failed to amend their Probate Code section 850 petition (Petition) within 30 days after the trial court had previously dismissed the Petition with 30 days leave amend. As discussed below, we conclude that the Robbins have failed to provide an adequate record for review, and therefore dismiss the appeal.

STATEMENT OF FACTS AND PROCEDURE

The Robbins, acting in pro per, filed a Petition under Probate Code section 850 on August 15, 2007. The Petition was filed against Burr in his capacity as trustee of the Robert Julian Ballard Revocable Family Trust (Trust). According to the Robbins's response to Burr's response to the Petition, filed with the trial court on October 11, 2007, and deemed a part of this appellate record by order of this court of October 23, 2008, the Petition sought to enforce some creditor claims involving assets that the Robbins had placed in a separate irrevocable trust in 1983, with themselves as beneficiaries and trustees. The purpose was to establish a cooperative business and family relationship between the Robbins and the Decedent, Robert Julian Ballard. The Robbins allege that they were to receive the assets upon the death of Decedent, but that the assets were at some point transferred to the Trust instead. The Decedent died on June 5, 2006.

A number of hearings, responses, oppositions to responses, and a new verified Petition followed. After a hearing on December 17, 2007, the trial court dismissed the Petition and granted the Robbins thirty days leave to file an amended petition. On December 20, 2007, the notice of ruling was filed and

served. The notice of ruling stated “The Petitioners’ Probate Code § 850 Petition is incomplete.”

On February 27, 2008, Burr filed a notice of motion and motion for entry of judgment in his favor on the ground that the Robbins had not filed an amended petition.

On March 17, 2008, the Robbins filed an opposition to Burr’s motion, based on Code of Civil Procedure, section 473. The Robbins argued that their failure to comply with the court order to amend the Petition was caused by the neglect of their attorney, Gary A. Quackenbush (attorney). The Robbins filed an accompanying declaration stating that they had “contacted Mr. Quackenbush twice and sent two e-mails in vain.”

On March 18, 2008, Burr filed a reply to the Robbins’s opposition. Burr argued that the Robbins’s failure to file an amended Petition was not caused by neglect of their attorney, because they had terminated the attorney after the December 17, 2007, hearing at which the trial court dismissed the Petition with leave to amend. Burr also argued that the Robbins were “perfectly capable of filing pleadings in pro per, as is demonstrated by the numerous pleadings that they have filed in this matter.”

On March 19, 2008, the attorney filed a declaration stating that the Robbins had hired him just a few days before the December 17, 2007, hearing and insisted that he attend by court call rather than in person. There was some mix up with the court call service, and the attorney was never put through to the correct court at the

correct time, and so was not present by phone at the hearing. On January 3, 2008, while the attorney was out of town at a seminar, the Robbins arrived at his office asking to take their file so they could copy it. The Robbins never returned the file. The attorney called the Robbins on January 7, 2008, and left a message asking if they wanted him to continue to represent them. The Robbins did not return the phone call. The Robbins also attempted to reverse the credit card charges for the \$2500 retainer they had paid to the attorney. The Robbins next contacted the attorney twice by e-mail, on March 10 and 14, 2008, asking that the credit charges be reversed, that the attorney provide services, and that he file a declaration in support of their argument under Code of Civil Procedure section 473.

The trial court held a hearing on March 25, 2008, on Burr's motion for entry of judgment. After taking the matter under submission, the court granted the motion. Judgment was entered on April 4, 2008. This appeal followed.

DISCUSSION

1. The Issue on Appeal

The parties disagree in their briefs as to what is the actual issue on appeal. The Robbins address the statute of limitations issues which the court apparently resolved against them at the December 17, 2007, hearing at which it dismissed their amended Petition with 30 days leave to amend. In his responsive brief, Burr asserts that the issue on appeal is solely whether the trial court erred in March 2008 when it granted Burr's motion for entry of judgment. We conclude that the

Robbins are correct that the trial court's ruling of December 17, 2007, is a proper subject of this appeal. This is because, under Civil Code of Procedure section 906, upon an appeal filed pursuant to Civil Code of Procedure section 904.1, "the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from" Here, the December 17, 2007 ruling dismissing the Petition with leave to amend is an interlocutory order, and could not be appealed until a final judgment had been entered, which happened when the trial court entered judgment after granting Burr's motion for entry of judgment. (See *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 457.)

The Robbins argue that the trial court erred when it denied their Petition as violating the statute of limitations contained in Code of Civil Procedure, section 366.2. We point out that the notice of ruling stated "The Petitioners' Probate Code § 850 Petition is incomplete" and did not mention the statute of limitations. No transcript of the December 17, 2007, hearing exists, so we can only infer that the trial court's ruling was based in part on the statute of limitations and in part on the "incompleteness" of the Petition.

In any case, Code of Civil Procedure, section 366.2 provides that, when a person dies and a cause of action against that person, "whether arising in contract, tort, or otherwise, and whether accrued or not accrued" survives their death, a lawsuit on that cause of action must be brought within one year of their death.

The statute applies only when the decedent/defendant died on or after January 1, 1993, and provides for a number of exceptions. Here, the Decedent died on June 5, 2006, and the Robbins filed their Petition on August 15, 2007, more than one year later.

Given the lack of a transcript for the December 17, 2007, hearing, our next step would be to examine the Petition itself to determine whether it is complete and whether it complies with the applicable statute of limitations. However, the record on appeal does not contain a copy of the Petition. We are therefore unable to determine whether the trial court erred in making the ruling from which the Robbins appeal. An appellant has the burden of producing a record which affirmatively demonstrates error. (*Aguilar v. Avis Rent-A-Car System, Inc.* (1999) 21 Cal.4th 121, 132.) Here, the Robbins have failed to produce that record and so the appeal is dismissed.¹

DISPOSITION

The appeal is dismissed. The Robbins shall pay Burr's costs on appeal.

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RAMIREZ

P.J.

We concur:

McKINSTER

J.

KING

J.

¹ Burr's motion for sanctions, filed December 22, 2008, is hereby denied.